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IN THE

Supreme Court of the United States

October Term, 1963.

No. 578

JOSEPH D'ERCOLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No.

JOSEPH D'ERCOLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Joseph D'Ercole prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 23, 1963 (Appendix A, *infra*, p. 19).

Citations to Opinions Below.

There was no opinion in the District Court. The opinion of the Second Circuit Court of Appeals is set forth in Appendix C hereto, beginning at page 21, and is reported as *United States v. Cimino and D'Ercole*, 321 F. 2d 509.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 23, 1963 (Appendix A, *infra*, p. 19). A petition for rehearing was timely made and denied on September 24, 1963 (Appendix B, *infra*, p. 20). The jurisdiction of the Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

1. Are a defendant's constitutional rights in a non-jury criminal case violated when the Judge is presented, under the Jencks Act, with a document which reveals the defendant's prior conviction of the same crime with which he is charged?

2. Should the rule of *Roviaro v. United States* (353 U. S. 53) be extended to require the Government to produce an informer where the evidence of guilt is barely sufficient, if sufficient at all, and where the testimony of the informer could tip the scales in favor of guilt or innocence?

Constitutional Provision Involved.

The petition raises issues under the Due Process Clause of the Constitution.

Statement of the Case.

The petitioner, D'Ercole, was indicted with one John Cimino for two substantive violations and a conspiracy to violate the Federal Narcotic Laws, Title 21, U. S. C., §§173, 174 (6a-5a),* and he and his co-defendant were convicted on both the substantive and conspiracy counts after

* Unless otherwise identified, references in parentheses are to pages of the Appendix before the Second Circuit and now before this Court.

a trial before Hon. Frederick van Pelt Bryan, United States District Judge for the Southern District of New York, without a jury. The petitioner has been sentenced to a term of 20 years on each of the three counts, the sentences to run concurrently.

At the trial, the Government relied mainly on the testimony of four narcotics agents, Myron B. Avant, David B. Costa, Jack L. Gohde and Frank Dolce, who testified about events occurring on three days, November 10, 1960, November 22, 1960, and December 10, 1960. For purposes of clarity, their testimony is given in the chronological sequence of the events to which they testified.

November 10, 1960.

9:30 a. m. Agent Avant and a special employee of the government, Saul Scott, drove by car to Brooklyn and there picked up Cimino, the petitioner's co-defendant (9a). They stopped at a bank to permit Cimino to make a mortgage payment (11a); and then drove to Manhattan. En route, they discussed the purchase of heroin. Cimino said he would have to get in touch with "Joe Z," subsequently identified by a government witness as D'Ercole, the petitioner herein (11a-12a).

12:30 p. m. Agent Avant testified that they arrived at 117th Street and 2nd Avenue, where Cimino left them saying he would meet them later at Benny's Luncheonette (12a).

Agent Costa testified that Cimino met the petitioner, D'Ercole, at 116th Street near Pleasant Avenue (33a).

Agent Dolce testified that Cimino met D'Ercole at 116th Street near 1st Avenue (58a); that D'Ercole then entered Gus' luncheonette, where he entered a telephone booth (59a); that after D'Ercole emerged from the luncheonette,

he, Dolce, went into the telephone booth and ascertained that the telephone number was Lehigh 4-9197 (59a).

1:30 p. m. Agent Avant testified that Cimino returned to Benny's Luncheonette and informed him that the price of ¼ kilo of heroin would be $3,800. Cimino then made a telephone call to Lehigh 4-9197 (12a).

7:00 p. m. Agent Avant testified that the defendant Cimino, a special employee of the Narcotics Bureau—an informer—and he met at the Eden Roc, a bar and grill (13a); that they then drove to 117th Street between 1st and 2nd Avenues where Cimino asked for and was given $3,800 (14a); that Cimino and the special employee got out of the car and in a few minutes they returned and said the delivery of the heroin was postponed to 9:30 p. m. (14a).

Agent Costa testified that Cimino, the special employee and D'Ercole met at Marconi's bakery at the northwest corner of 117th Street and 1st Avenue (34a).

Agent Gohde testified that Cimino, the special employee and D'Ercole came out of the pastry shop and separated (55a); that then D'Ercole walked east on 115th Street where a group of men was standing (55a); that one of this group joined D'Ercole and was heard to say: "I have another deal; your deal will have to wait until nine-thirty" (56a).

8:45 p. m. Agent Avant testified that Cimino, the special employee and he met at the Eden Roc; that they then drove to 117th Street and 1st Avenue (14a); that Cimino and the special employee left the car and in a short time returned and informed Avant that delivery would be made after "the trotters" (harness races at Yonkers Raceway) were over (17a); that thereupon the three of them returned to the Eden Roc (18a).

9:45 p. m. Agent Avant testified that about 9:45 p. m. Cimino, the special employee and he left the Eden Roc and drove back to 117th Street and 1st Avenue (18a); that there Cimino left the car and directed Avant and the special employee to go to Benny's Luncheonette at 116th Street and 3rd Avenue and to wait there for the delivery (18a). Avant and the special employee went to the luncheonette and, after about 20 minutes to a half hour, they left the luncheonette and sat in the government car parked almost in front of the luncheonette (18a). At about 11:30 p. m. Cimino returned and asked to be driven back to the Eden Roc. En route Cimino handed him a package of heroin (19a). Avant dropped off Cimino and the special employee at the Eden Roc and then joined Agent Costa (20a). He then telephoned Cimino at the Eden Roc and told him he was satisfied with the contents (20a).

Agent Costa testified that about 9:30 p. m. Avant, Cimino and the special employee again drove to 117th Street near 1st Avenue (35a). Cimino and the special employee left the car and joined D'Ercole in a drugstore on 1st Avenue (35a). After a conversation in the drugstore Cimino and the special employee returned to Avant's car. They then drove to Benny's Luncheonette and remained there a short time and then drove back to 117th Street (35a-36a). [This is in contradiction of Avant's testimony that, after Cimino and the special employee returned to the car, they went back to the Eden Roc and from the Eden Roc returned back to 117th Street (18a).] At 117th Street Cimino left the car and entered a Cadillac which drove north on 1st Avenue. Costa was unable to follow it and returned to Benny's Luncheonette (37a).

November 22, 1960.

2:00 p. m. Agent Avant testified that Cimino, the special employee and he met at the Eden Roc and thence

drove to Benny's Luncheonette at 116th Street and 3rd Avenue (20a); that there Cimino telephoned Lehigh 4-9197 and then reported he had arranged to meet D'Ercole in the luncheonette at 1st Avenue (21a); that Avant gave Cimino $3,600 and they then drove to 118th Street and 1st Avenue where Cimino got out of the car, saying he would meet them at the Eden Roc at 8:30 p. m. (21a).

Agent Costa testified that Cimino and D'Ercole met in a luncheonette at 116th Street and 1st Avenue (43a).

7:30 p. m. Agent Avant testified that Cimino, the special employee and he met at the Eden Roc and drove to 118th near 2nd Avenue. Cimino got out of the car and told Avant and the special employee to return to the Eden Roc (24a).

Agent Costa testified that he saw Avant, Cimino and the special employee at 117th Street between 1st and 2nd Avenues where Cimino left the government car. Cimino met D'Ercole on 116th Street near Pleasant Avenue and spoke with him for about 15 or 20 minutes (44a).

8:45 p. m. Agent Avant testified that Cimino, the special employee and he met at the Eden Roc, where Cimino told him delivery would be made at 10:00 p. m. (24a).

9:30 p. m. Agent Avant testified that Cimino, the special employee and he left the Eden Roc and drove to 118th Street and 2nd Avenue where Cimino left the car and instructed the other two to return to the Eden Roc (24a).

10:30 p. m. Agent Avant testified that Cimino returned to the Eden Roc and gave him a package (later identified as heroin); that Cimino told him he would arrange for Avant to meet D'Ercole when the next purchase was made (24a).

December 7, 1960.

12:00 noon. Agent Avant testified that he met Cimino by appointment at 116th Street and 3rd Avenue and told him he wanted to buy another ¼ kilo and wanted to meet Joe Z; that Cimino then told him to telephone him at 3:00 p. m. at Lehigh 4-9197 (25a).

3:00 p. m. Agent Avant testified he telephoned Lehigh 4-9197 and talked with Cimino (26a); that he then told Cimino he wanted to talk to Joe Z (30a); that another man got on the telephone and said: "'This is Joe Z. Give Johnny the money as you have done previously on your other two purchases. Everything will be all right. • • • The quality and quantity of the stuff will be about the same. Later on we can meet and have dinner and discuss the price on future purchases'" (30a).

Agent Costa testified that at approximately 3:00 p. m. he saw Cimino and D'Ercole in front of Gus' luncheonette; that he saw them enter the luncheonette; that Cimino entered a telephone booth at the rear of the store (47a); that then D'Ercole entered the booth "for a few minutes"; that D'Ercole emerged and Cimino went back into the booth (48a).

Carmine Valenti was called as a witness for the defendant. During his testimony two photographs, D'Ercole Exhibit A (74a) and D'Ercole Exhibit B (75a) were received in evidence.

D'Ercole Exhibit A shows the exterior of Gus' Luncheonette; D'Ercole Exhibit B shows the interior of the luncheonette, and the location of two telephone booths. Valenti testified they were in the same location in December, 1960, as they are in the photograph.

D'Ercole was not arrested until August, 1962. He was indicted September 5, 1962.

At the trial, D'Ercole did not testify in his own behalf.

REASONS FOR GRANTING THE WRIT.

1. This Court has never passed upon the important issue of constitutional law and federal trial procedure of whether a defendant's rights in a non-jury criminal case are irretrievably prejudiced where the trial judge, inspecting a document under the Jencks Act, is informed of the defendant's prior conviction of the same crime as that for which he is being tried.

On the second day of trial, while the Narcotics Agent Costa was testifying, the defendant Cimino sought the production, under the Jencks Act, 18 U. S. C., §3500, of a report which had been made by the agent. The report concerned was "in effect a compendium of all the information contained in [Costa's] memorandum reports" and it was based "not only on his own actions, his own observations, but also, of course, things related to him by other officers assisting in the investigation" (48a). Marked and introduced as Court's Exhibit 16 for identification and reproduced on pages 94a-104a of the petitioner's appendix before this Court, the report is seen to contain varied information, including the petitioner's prior conviction of two narcotics offenses (96a) and the statements that "the source of supply for Cimino was D'Ercole. D'Ercole is part of the Italian organization in the East Harlem area" (104a).

Although the majority opinion below contains the statement that "the defendants asked to have [the Costa] report produced" (Appendix C, *infra*, p. 25), it is respectfully urged that this is a misstatement of the record. Actually counsel for the petitioner D'Ercole sought vigorously to have the report excluded and it was only the defendant Cimino who asked its production (38a-42a). Petitioner's counsel, alerted to the possibility of preju-

dicial matter in the report, sought to keep it from going before the Trial Judge, saying:

> "Your Honor, before you look at the report I should like to make this observation, and I say this because I feel it my duty to state to the Court what I have in mind: Your Honor is sitting also as a jury here. If there is anything in the report that would indicate improper matter as to either defendant it would be the subject, then, as to whether a mistrial is not in order" (38a).

And after the Trial Judge had read the prejudicial report, petitioner's counsel made a motion for a mistrial (52a).

The Trial Judge denied the motion for a mistrial (52a-53a). It was evidently his view that a Trial Judge, sitting without a jury, "must of necessity see matters which are not admissible in evidence" when applying the Jencks Act and that if he could not, "we might as well give up the trial of non-jury cases in criminal matters" (40a, 52a-53a).

The prejudice arising to the petitioner from the Trial Judge's inspection of the Costa report was one of the major errors urged on appeal. Significantly on this petition for certiorari, the majority below, while denying the substance of the contention, characterized it as posing

> "an interesting problem of alleged conflict between the Jencks Act, 18 U. S. C., §3500, and the normal rule excluding evidence of a defendant's prior criminal record when he does not take the stand in his own defense or raise an issue as to his character" (Appendix C, *infra*, p. 25).

The majority also characterized the problem in this fashion:

> "* * * the appellants do pose a real problem: efficient administration of [3500] must be balanced

against potential prejudice to defendants in non-jury cases" (Appendix C, *infra*, p. 25).

It is respectfully submitted that the issue characterized by the Court below as "interesting" and a "real problem" has never been passed upon by this Court and is of sufficient moment in the administration of criminal justice to warrant the Court's review.

As the Circuit Court below pointed out, the issue posed on this petition involves a conflict of two basic principles: On the one hand, there is no doubt that, where a defendant demands a witness' statement and where the Government claims that parts or all of the statement are unavailable under the Jencks Act, there must be a judicial determination of the issue. On the other hand, it is also undisputed that, unless put in issue by the defendant, his past criminal record is not admissible against him. As Wigmore has indicated, this rule is founded upon the fact that:

> "The natural and inevitable tendency of the tribunal—*whether judge or jury*—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge" (1 Wigmore on Evidence, § 194, p. 646, 3d Ed. 1940). (Emphasis supplied.)

The conflict between these two principles arises, of course, in the non-jury trial of a criminal case where the same Judge who passes upon disputes under the Jencks Act is the trier of fact. Since many of the statements demanded under the Jencks Act will have in them prejudicial information about a defendant's past crimes—as is true in this case—and since a Trial Judge will have, according to Wigmore, a "natural and inevitable tendency . . . to give excessive weight to the vicious record of

crime thus exhibited," normal administration of the Jencks Act may possibly involve severe prejudice to a defendant.

Both the Trial Court and the Court of Appeals in this case were of the opinion that the conflict thus described is an inevitable one and that the defendant's rights under the circumstances must be sacrificed to the necessity of enforcing the Jencks Act. It is the petitioner's contention that, in the first place, this conflict is *not* inevitable at all and, in the second place, that the threat to a defendant's rights posed under these circumstances is so very grave as to require some extraordinary remedy.

The plain fact is that, although there must be a judicial determination of the Jencks Act issue where it arises, there is no reason why a Trial Judge who is sitting without a jury must make that determination. A simple expedient for the resolution of the difficulty would be to have the issue brought before some other Federal Judge. In many, if not most, federal districts this could be done without undue delay and, thereby, the Jencks Act could be administered in a non-jury case without any impediment or prejudice to a defendant's rights.

Even if another Judge is unavailable, however, or even if the use of another Judge is deemed inadvisable, other alternatives are easy to hand. The prosecutor, in consultation with the defense counsel, could well be required to excise or otherwise cover over the objectionable material. Or, in the alternative, where the prosecutor knows the issue is bound to arise, he could—again, in consultation with defense counsel—be required to prepare a clean copy of the statement without the offending references.

Some such extraordinary remedy must be available because the procedure followed in this case simply does not comport with settled constitutional principles of fairness or settled views of human nature. The Circuit Court ma-

jority below concluded that it is "reasonable to trust a Judge to ignore non-evidentiary matter," on the same theory that it is "presumed that a jury will pay no attention to evidence brought out and ordered stricken as to evidence which the jury is instructed to disregard" (Appendix C, *infra*, p. 26). Although this conclusion surely is true of some types of evidence, it certainly is not true where the evidence concerned is of past convictions, especially past convictions in narcotics cases, such as are involved herein.

The Second Circuit itself has recognized this in jury cases where it has held that an admonition to the jury to disregard a disclosure of a criminal record "could not have erased from their minds its prejudicial effect" (*United States v. Tomaiolo*, 249 F. 2d 683, 695). With due respect, it is urged that Judges, no less than jurors, are human and that the instinctive and overwhelming tendency to give excessive weight to evidence of criminal record, especially a record of narcotics convictions, is as pronounced in Judges as jurors. Therefore, such criminal record can no more reasonably be expected to be disregarded by Judges than by jurors.

The contrary conclusion reached by the Circuit Court below not only flies in the face of the eminent authority of Wigmore quoted above on page 10, but also is contradicted in an important dictum pronounced by Judge Cardozo (*People v. Zackowitz*, 254 N. Y. 192, 198), and by a decision of the Fourth Circuit Court of Appeals in *Benton v. United States* (233 F. 2d 491). In that case, tried as this one was without a jury, evidence of a past conviction was introduced to make out proof of intent. In reversing the conviction, the unanimous Circuit Court, Judge Soper writing, declared:

> "We do not think it possible to say that the reputation and record of the defendant did not enter into

the conclusions of the District Judge or contributed to the finding of guilt" (233 F. 2d at p. 492).

Since this Court has never passed upon the issue thus raised and since grave prejudice to a defendant is unnecessarily imposed upon a defendant by the rule sanctioned by the Circuit Court in this case, this Court should grant certiorari.

2. This case poses a novel, interesting and substantial question as to the extension of the rule of *Roviaro* v. *United States* (353 U. S. 53), so as to require the Government, under special circumstances, not only to name, but also to produce an informer at trial.

The only evidence in this case which tends in the least to establish the petitioner D'Ercole's participation in a narcotics conspiracy* is that of Narcotics Agent Costa. This evidence, found sufficient by the majority below but declared insufficient for conviction by Judge Waterman, who dissented, was summarized by the majority below as follows:

> "At about noon on [December 7, 1960] Avant [a narcotics agent] and Cimino met at Benny's Luncheonette in Manhattan and negotiated for a third purchase [of narcotics] which was never completed. Avant expressed a desire to meet Joe Z and Cimino suggested that he telephone Joe Z at LE 4-9197 at 3 o'clock that afternoon; Avant made the call and it was answered by Cimino whose voice Avant recognized. Avant then asked to speak to Joe Z and a different voice replied, 'This is Joe Z,' and added, 'Give Johnny [Cimino] the money as

* Evidently because the sentences imposed ran concurrently, the Circuit Court majority never reached the question of the petitioner's guilt on the substantive counts. This Court must, however, conclude as dissenting Judge Waterman did below (Appendix C, *infra*, p. 27) that there was simply no evidence tending to the substantiation of guilt on the substantive counts.

> "you have done previously on your other two purchases. Everything will be all right. The quality and quantity of the stuff will be about the same. Later on we can meet and have dinner and discuss the price on future purchases.' Agent Costa, who was surveilling the premises where LE 4-9197 was located, Gus' restaurant, testified that at about 3 P. M. on December 7, 1960, he saw Cimino enter the telephone booth. D'Ercole then entered the booth. When D'Ercole came out Cimino re-entered the booth."

This identification by Agent Costa of the petitioner as "Joe Z," constituting, as it does, the only evidence linking D'Ercole to the conspiracy, must be read in the light of the fact that Costa made most of his observations from a point across the street from "Gus' restaurant"[*] and that he had to be able to see through a glass front door to a point at the rear of the restaurant where the phone booth was located (47a-48a). If Defendant's Exhibits A and B, contained in the Circuit Court Appendix below, which are photographs of the front of the restaurant and the telephone booths on the inside, are viewed in the light of the physical facts as to where Costa made his observations, the conclusion is irresistible that the evidence on which the petitioner was convicted was either insufficient—as dissenting Judge Waterman below concluded—or else barely sufficient.

It is under these special circumstances, namely, where the evidence of guilt is, at best, barely sufficient, that the petitioner urges this Court to extend the rule of *Roviaro v. United States* (353 U. S. 53) to require the Government

[*] "Upon cross examination Costa stated, for the first time, that while [D'Ercole and Cimino] were in the luncheonette he crossed 116th Street, looked through the closed glass door for 'five seconds at the most,' then returned to his post on the south side of the street. No explanation was given as to [who] was in a phone booth during this five-second period, nor are we told which of the events, previously recounted on direct examination, occurred while Costa's back was to the luncheonette as he returned to the south side of the street." Quoted from Judge Waterman's dissent, Appendix C, *infra*, p. 29.

not only to name—as was required in *Roviaro*—but also to produce at trial an informer whose evidence could clearly tip the scales one way or another and who is under actual or constructive Government control.

The informer Sapp, alias Scott, was said by Agent Avant to have introduced him to the defendant Cimino on November 22. Later that day Sapp was said to have been with petitioner D'Ercole when he had a conversation with Cifnino which preceded the delivery of heroin to Avant. Again on November 22, when another delivery of narcotics was made by Cimino to Avant, Cimino was said to have been seen to have been engaged in conversation with Sapp and D'Ercole.

Without any testimony as to the substance of the conversations between Sapp, Cimino and D'Ercole, such conversations could well be given a sinister connotation. Considering the fact that Sapp was available to the Government shortly before trial and that, with due diligence and regard to the defendant D'Ercole's rights, he could have been made available by the Government at the time of trial,* one must presume that the Government was more interested in preserving the sinister character of the conversations rather than in the truth, which could have been established by Sapp's presence at the trial. The Government's handling of Sapp in this case is a plain affront to the principle recently restated by Mr. Justice

* Dissenting Judge Waterman outlines the evidence that Sapp was under the constructive power of the government (Appendix C, *infra*, pp. 32-37) and it is needless to repeat it in full. However, Judge Waterman's concluding comment on the absence of the informer is enlightening. Says Judge Waterman:

> "The courtroom shyness of this particular special employee has been the subject of discussion by our court heretofore, see *United States v. Glaze*, 313 F. 2d 575 (2 Cir. 1963), where he appears under his alias of 'Saul Scott,' the designation adopted by my colleagues in the majority opinion. I believe it time to have this shyness overcome" (Appendix C, *infra*, p. 37).

Brennan in *Jencks v. United States* (353 U. S. 657, 668) to the effect that:

> "The interest of the United States in a criminal prosecution * * * is not that it shall win a case, but that justice shall be done * * *."

The petitioner does not, of course, insist that an informer must always be produced. He does urge, however, that the underlying philosophy and spirit of the *Roviaro* case (353 U. S. 53, *supra*) require production where the evidence of guilt is extremely weak and where the informer's testimony could clearly establish guilt or innocence.* In a case where the informer's testimony could be crucial—as is the case here—it is an idle and, possibly, a cruel gesture for the Government, itself having been able to produce the informer, to say, "Here is his name; try and find him." Even if the Government cooperates at the time of trial to help find the informer—as we assume was the case here—the callousness complained of is the fact that, knowing before trial that his testimony could be crucial, the Government allows the informer to slip through its fingers.

This blatant disregard of the rights of defendants and this insensitivity to the spirit of the principles announced by this Court in *Roviaro*, which is complained of herein, has been evidenced in enough cases to make one suspect a preconceived pattern. Thus, in the prosecution of Victor Panica, Richard Mitchell and Vincent Zoccolillo—three separate prosecutions in the Southern District Court of New York, the records of which can, of course, be made available to this Court—the same pattern appeared as is found

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* As Judge Waterman most aptly observed:

> "Testimony from Sapp (provided that it was confirmatory of the inferences which the prosecution sought to draw) would have transformed a case of questionable evidentiary sufficiency into a prosecution establishing D'Ercole's guilt beyond any peradventure of doubt." (Appendix C, *infra*, p. 32).

here. In the *Zeccolillo* case, it led to a dismissal, with District Court Judge Weinfeld declaring*:

> "It was because the Court had this deep concern about the factors that had intruded themselves in count 2 that it felt, in the interests of justice, every effort should be made to locate Abene, the informer who introduced Agent Coursey to DeMaio and who, according to the government's testimony, was present when the $1,500 was paid over to DeMaio, was present at the time of the alleged conversation with Zoccolillo, was present when it is said Zoccolillo told him to pay back the $300 and he had only three ounces, was present when Zoccolillo is charged with having said to DeMaio, 'Tell him to go with Sonny and Sonny will show him where the narcotics are stashed at 505 East 118th Street.' In this circumstance, the Court believed it was essential to obtain the presence and the sworn testimony of the informer, whether his testimony would be harmful or helpful to either the government or to the defendants.
>
> "The Court made it clear that Abene would be called to the witness stand by the Court and would be questioned directly by the Court with an opportunity to each side to cross examine him. I am not satisfied the government exerted to the full the necessary effort and resources to bring the informer to the courtroom. Accordingly, the Court finds the defendant Vincent Zoccolillo not guilty."

Considering the abuses which a system of faceless paid informers may spawn, this Court should re-examine its rule in *Roviaro* and extend it in the limited fashion of requiring the Government to produce an informer at trial where the informer was within the Government's control at the time of indictment and where the evidence of guilt against the defendant is so weak that the informer's testimony could tip the scales in favor of guilt or innocence. Such a rule would in no sense impair the proper use of

* Oral opinion filed on February 6, 1963, pp. 5-6

informers (see *Roviaro v. United States*, 353 U. S. 53, 61-62, *supra*) and, yet, it would have the virtue of giving actual substance to what is often only the idle gesture required under *Roviaro*. It would thus insure that:

> "The interest of the United States in criminal prosecutions * * * is not that it shall win a case, but that justice shall be done" (*Jencks v. United States*, 353 U. S. 657, 668, *supra*).

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

THOMAS J. TODARELLI,
Counsel for Petitioner.

PETER L. F. SABBATINO,
EDWARD J. BLOUSTEIN,
Of Counsel.

October, 1963.

Appendix A—Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and sixty-three.

Present:

Hon. THOMAS W. SWAN,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN CIMINO and JOSEPH D'ERCOLE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix B—Orders Denying Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA

v.

JOHN CIMINO and JOSEPH D'ERCOLE.

Before Swan, Waterman and Moore, Circuit Judges.

Petitions for rehearing.

Each petition for rehearing is denied. Pursuant to Rule 28(c) of the Rules of this court issuance of the mandates is stayed pending application for certiorari; each defendant is continued on bail, Cimino in the amount of $50,000 and D'Ercole in the amount of $50,000.

T. W. S.
S. R. W.
L. P. M.

September 24, 1963

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH D'ERCOLE,

Appellant.

Petition for Rehearing en Banc.

Salpietro & Tolafelli, New York, N. Y., for appellant.

No active circuit judge having requested that the case be reheard *en banc*, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

24 September 1963

Appendix C—Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 360—October Term, 1962

(Argued April 23, 1963 Decided July 23, 1963)

Docket No. 28092

UNITED STATES OF AMERICA,

Appellee,

JOHN CIMINO and JOSEPH D'ERCOLE,

Appellants.

Before:

SWAN, WATERMAN and MOORE, Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, after trial without a jury, on a three count indictment charging two narcotics substantive offenses in violation of §§173 and 174 of Title 21 U. S. Code, and a conspiracy to violate those sections, Bryan, *J.* Affirmed on both appeals.

James J. Hanrahan, New York City, Attorney for Appellant Cimino.

Sabbatino & Todarelli, New York City, for Appellant D'Ercole; Thomas J. Todarelli, of Counsel.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for the United

States of America; Jack D. Samuels and Arnold N. Ecker, Assistant United States Attorneys, of Counsel.

SWAN, Circuit Judge:

After trial before Judge Bryan, a jury having been waived, the defendants were convicted, and each was sentenced to imprisonment in a federal penitentiary for a period of 20 years on each count of the three count indictment, the sentences to run concurrently. Each defendant has appealed. Their appeals challenge the sufficiency of the evidence to support the convictions and raise several points of law requiring discussion.

In making its case the Government relied upon testimony of agents of the Federal Bureau of Narcotics. Neither defendant took the stand. The testimony of the Government witnesses is substantially undisputed as to the substantive offenses.

A. THE SUBSTANTIVE COUNTS

Cimino's guilt of the two substantive offenses alleged in the indictment was so clearly established that a very brief statement of the testimony will suffice. In Brooklyn, on the morning of November 10, 1960, Cimino was introduced to Agent Avant by a "special employee" of the Federal Bureau of Narcotics by the name of Saul Scott, who was not produced as a witness. Cimino, Scott and Avant drove in the latter's automobile to Manhattan and on the way Avant began negotiations with Cimino for the purchase of a quarter kilo of heroin. Cimino said he would have to consult his source, Joe Z; he added that he could not fix a price, but that it would probably be between $3,600 and $4,200. Avant never saw Joe Z but other agents identified him as D'Ercole. Purchase of the heroin was completed in Manhattan between Avant and Cimino during the night of November 10. A second purchase of the same quantity of

heroin, following a similar factual pattern, was completed between them on the night of November 22, 1960.

Whether the evidence as to D'Ercole was insufficient, as he argues, to support his conviction on the substantive counts, we need not determine because a holding of insufficiency would be of little avail to him if his conviction on the conspiracy count is sustained, since the sentence on this count was also 20 years. However, it may be noted that the Avant-Cimino-D'Ercole conversation discussed under the conspiracy count may well have been sufficient to establish that D'Ercole was in a position of control and, hence, an imputed participant in the sales. Cf. *United States v. Moia*, 2 Cir., 251 F. 2d 255.

B. The Conspiracy Count

Count 3 of the indictment charges that from January 18, 1960 to the date of filing the indictment [September 5, 1962] the defendants "and others to the Grand Jury unknown" unlawfully conspired to violate §§173 and 174 of Title 21 United States Code. The alleged overt acts were (1) that Cimino met with D'Ercole on November 10, 1960; (2) that on the same date Cimino "delivered a quantity of narcotics";[1] and (3) that on November 22, 1960 Cimino met with D'Ercole.

Witnesses for the prosecution proved the meetings between Cimino and D'Ercole on November 10 and 22 but no witness overheard their conversations or saw anything passed from one to the other. Their mere meeting was no evidence of their being conspirators; nor was Cimino's statement to Avant that Joe Z was "the source" of the heroin sold by Cimino competent evidence against D'Ercole. "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." See *Glasser v. United States*, 315 U. S. 60, 74-76.

[1] The only delivery proved was to Agent Avant who purchased heroin from Cimino on that date and on November 22, 1960.

The evidence relied upon by the Government is an incident which occurred on December 7, 1960. At about noon on that date Avant and Cimino met at Benny's Luncheonette in Manhattan and negotiated for a third purchase which was never completed. Avant expressed a desire to meet Joe Z and Cimino suggested that he telephone Joe Z at LE 4-9197 at 3 o'clock that afternoon; Avant made the call and it was answered by Cimino whose voice Avant recognized. Avant then asked to speak with Joe Z and a different voice replied "This is Joe Z" and added "Give Johnny [Cimino] the money as you have done previously on your other two purchases. Everything will be all right. The quality and quantity of the stuff will be about the same. Later on we can meet and have dinner and discuss the price on future purchases." Agent Costa, who was surveilling the premises where LE 4-9197 was located, Gus' restaurant, testified that at about 3 P. M. on December 7, 1960, he saw Cimino enter the telephone booth. D'Ercole then entered the booth. When D'Ercole came out Cimino re-entered the booth.

Judge Bryan convicted both defendants on the conspiracy count. In so doing it is obvious that he believed Avant's testimony as to what D'Ercole said on the telephone and Costa's testimony that D'Ercole was using the telephone at the time Avant talked with the voice which said "This is Joe Z." The Avant-Cimino-D'Ercole conversation was not hearsay. It was independent evidence—an admission from D'Ercole's own lips—of his complicity in the transactions on November 10 and 22. Although it is true as D'Ercole argues that the trial judge had to make certain deductions from the proof, nevertheless Costa actually saw D'Ercole enter the telephone booth when Cimino came out and saw Cimino re-enter after D'Ercole left. This was sufficient to establish D'Ercole as the owner of the voice. See *United States v. Kahaner, et al.*, 2 Cir., 317 F. 2d 459 (April 25, 1963), footnote 4; 72 Harv. L. Rev. 920, 987.

C. Alleged Errors of Law

Several of the points raised on the appeal are asserted by both appellants. The first of these poses an interesting problem of alleged conflict between the "Jencks Act," 18 U. S. C., §3500, and the normal rule excluding evidence of a defendant's prior criminal record when he does not take the stand in his own defense or raise an issue as to his character. The problem arose early in the trial with respect to a document marked as Court's Exhibit 16 for Identification. This was a report made by Agent Costa, a witness for the prosecution, which the defendants asked to have produced under the Jencks Act. It contained *inter alia* a record of the defendants' prior criminal convictions. The trial judge read the Exhibit to determine its producibility under §3500, and said that it contained matter which would have been grounds for a mistrial had it been called to the attention of a jury, but that he would not consider the non-evidentiary material but would decide the case "solely on the evidence." Each defendant then moved for a mistrial. Their motions were denied.

The appellants contend that the trial court's examination of the Exhibit was an error which entitles them to a new trial. This claim is premised on the notion that even in a non-jury case, any judge sitting as trier of the facts, cannot fail to be biased by knowing of a defendant's prior criminal record.[2] They suggest that such knowledge could have been avoided if the prosecutor had excised the prejudicial material before the Exhibit was handed to the judge for examination pursuant to §3500. To require, or even to condone, selective disclosure to the court of

[2] Wigmore on Evidence §194 appears to take this view, and was quoted to that effect by Cardozo, C. J., in *People v. Zackowitz*, 254 N. Y. 192, 198, 172 N. E. 466, 468. The quotation is dictum, since *Zackowitz* involved a jury trial; and in any event a New York decision would not be controlling on this court in the case at bar. Nevertheless, the appellants do pose a real problem: efficient administration of §3500 must be balanced against potential prejudice to defendants in non-jury cases.

statements requested under §3500 would, in our opinion, run counter to the admonitions of this Court in *United States v. Aviles*, 2 Cir., 315 F. 2d 186. Moreover, if it is to be presumed that a jury will pay no attention to evidence brought out and ordered stricken or to evidence which the jury is instructed to disregard, it is even more reasonable to trust a judge to ignore non-evidentiary matter. We hold that the motions for mistrial were properly denied.

Appellants also urge that it was error to try them while the Government informer, Saul Scott, was unavailable as a witness; D'Ercole argues, in the alternative, that a continuance should have been granted to permit further search for Scott. No case of which we are aware has held that mere failure of production is reversible error, where diligent search for the special employee has been made. *Roviaro v. United States*, 353 U. S. 53, requires only that the Government identify its informant; the duty does not extend to production, *Williams v. United States*, 9 Cir., 273 F. 2d 781, 795-96, cert. denied 362 U. S. 951; *Eberhart v. United States*, 9 Cir., 262 F. 2d 421, 422. There was no error in proceeding to trial without the missing witness. The granting of a continuance is a matter of discretion, see, *e. g., Smith v. United States*, 10 Cir., 273 F. 2d 462, 466, cert. denied 363 U. S. 846. We see no abuse of discretion in denial of the continuance.

Appellant Cimino contends that the indictment should have been dismissed for vagueness. The point is utterly without merit. See *Brown v. United States*, 9 Cir., 222 F. 2d 293, 296, a prosecution brought under 173 and 174 of Title 21, where the court stated:

> "• • • where, as here, a statute creating an offense sets forth, fully, directly and expressly, all of the essential elements necessary to constitute a crime intended to be punished, it is sufficient if the indictment charges the offense in substantially the words of the statute."

Equally futile is Cimino's argument that the indictment was void because based on hearsay testimony of Agent Costa before the grand jury. No discussion is necessary. See *United States v. Costello*, 350 U. S. 359, 363.

Finally Cimino argues that Judge Bryan's general finding of guilt was insufficient. Rule 23(c) F. R. Cr. P. provides: "In a case tried without a jury the Court shall make a general finding and shall in addition *on request* find the facts specially." (Emphasis added.) Cimino made no request for the special findings.

The judgments of conviction are affirmed.

WATERMAN, Circuit Judge (concurring in part and dissenting in part):

Although I concur in the affirmance of Cimino's conviction, the appeal of D'Ercole raises questions which are not, in my view, answered by the majority opinion.

The central question is whether there is sufficient evidence in the record before us to sustain D'Ercole's conviction on the conspiracy count in the indictment.[1] That question raises, in turn, the issue of whether the Government's failure to produce the government informer, Saul Sapp, alias Scott, as a potential defense witness at the time of trial, or to call Sapp as a government witness, should materially affect the consideration of the central question.

---

[1] The majority opinion does not reach the issue of D'Ercole's guilt under the substantive counts of the indictment. Were it to do so, I submit that this conviction on these counts could not stand. The counts are based upon Avant's purchases of narcotics on November 10 and 22, 1962. On neither day were any conversations overheard between Cimino and D'Ercole; nor did any witness see D'Ercole in possession of narcotics or D'Ercole pass anything to Cimino. See *United States v. Jones*, 308 F. 2d 26 (2 Cir. 1962); *United States v. Hernandez*, 290 F. 2d 86 (2 Cir. 1961); *United States v. Santore*, 290 F. 2d 51, 76 (2 Cir. 1960); and *Hernandez v. United States*, 300 F. 2d 144 (9 Cir. 1962).

The events covered by the indictment occurred on three separate days in 1960: November 10, November 22, and December 7. On November 10, Sapp introduced Narcotics Agent Myron Avant to appellant Cimino for the first time. During the course of negotiations with Avant about the purchase of a quarter kilo of heroin, Cimino stated that his source of supply was a person named "Josie" or "Joe Z". Later that day, before the delivery of the heroin to Avant, Cimino was twice seen talking to D'Ercole and the informer Sapp.

On November 22, Avant made a second purchase of heroin from Cimino. Again "Josie" was said by Cimino to be the source of supply and the person with whom he would have to make arrangements for delivery. Again Cimino and Sapp were seen engaged in conversations with D'Ercole.

On December 7, Avant began negotiations with Cimino for a third purchase of narcotics which was never completed. When Avant asked to meet "Josie," he was given a telephone number to call at three P. M. When Avant called at the appointed time, a voice which he recognized to be that of Cimino answered. After a brief conversation Agent Avant asked to speak to Josie. Thereafter a voice said "This is Josie. Give Johnny the money as you have done previously on your other two purchases. Everything will be all right. The quantity and quality of the stuff will be the same. Later on we can meet and have dinner and discuss the price on future purchases." Avant did not recognize the voice. The promised meeting never took place.

In order to establish D'Ercole's participation in the criminal conspiracy, therefore, the Government was required to rely exclusively upon the testimony of a second agent, David W. Costa, who testified that at approximately 3:00 P. M. on December 7, 1960, he was standing on the south side of 116th Street between First and Pleasant

Avenues. He thereupon observed Cimino and D'Ercole enter Guss's Luncheonette on the north side of the street and walk to the rear of the building, where Cimino entered a phone booth. When Cimino came out of the booth, according to Agent Costa's testimony, D'Ercole entered, remained a few minutes, and came out. Cimino then returned to the phone booth for a few moments, and thereafter walked out of the luncheonette with D'Ercole. The Agent further testified that the number of the telephone in the booth which appellants entered was the same one which Agent Avant had been given for purposes of contacting "Josie".

Upon this testimony D'Ercole is found to be the mysterious "Josie", is convicted, and receives a 20-year prison sentence. Costa testified that he fixed the time when Cimino and D'Ercole were in Guss's Luncheonette as only "approximately" at 3 P. M. on December 7. Appellants' entry into the luncheonette and telephone booth could be significant, however, only if it occurred simultaneously with Avant's telephone call. Most of Costa's observations were made from the south side of 116th Street which, he testified, was approximately 60 feet wide between First and Pleasant Avenues.[2] Costa, then, if he observed appellants' activities from the south side of 116th Street, had to observe them through the closed glass front door of the luncheonette, which was located on the north side of the street, while appellants were at the back of the luncheonette and, at least for a time, inside one of the two telephone booths. Costa was, of course, unable to overhear any conversation either of the appellants may have had while in the telephone booth. Indeed, he could not determine

[2] Upon cross examination Costa stated, for the first time, that while appellants were in the luncheonette he crossed 116th Street, looked through the closed glass door for "five seconds at the most," then returned to his post on the south side of the street. No explanation was given as to which appellant was in a phone booth during this five second period, nor are we told which of the events, previously recounted on direct examination, occurred while Costa's back was to the luncheonette as he returned to the south side of the street.

whether they initiated or received any telephone call at all during the time they were there.

The above constitutes the Government's evidence against D'Ercole, and, viewing it in its most favorable light, there remain limitations upon the accuracy of human observation[3] and upon the validity of inferences from circumstantial evidence which occur to me to be too perilous to be ignored when a twenty-year prison sentence is at stake.

The standard of appellate review is not, of course, the same as that to be applied by a trial judge. D'Ercole's conviction must be affirmed unless it was "clearly erroneous". Even by this generous standard, however, my brothers will agree, I believe, that, at best, the evidence supporting D'Ercole's guilt was marginal. Where my brothers and I may disagree is in the inference to be drawn, if any, from the Government's failure to produce, at the time of the trial below, or to call as a witness, Saul Sapp, the "special employee".

During the trial the Government maintained that although it was obliged to divulge the name of its informer, *Roviaro v. United States*, 353 U. S. 53 (1957), it had no duty to produce him as a potential witness for the defense or "to place on the witness stand every person with some knowledge of the circumstances." The trial judge did not disagree with this interpretation of the government's obligations. Nevertheless, because of the evident importance of the informer's possible testimony, Judge Bryan repeatedly requested the Government to aid defense counsel in

[3] When, during cross examination, Agent Costa was questioned about occasional discrepancies, between his testimony of events in 1960 and his "daily reports," made within a few days of the events, he readily conceded that the reports must be correct and the testimony wrong because he was testifying "nearly two years after" the events in question. Costa's reliance upon his reports rather than independent memory, however, raises the question whether the reports, themselves, were confined to the agent's personal observations. During his lengthy testimony before the Grand Jury, Costa answered many questions as if from personal observation. Upon cross examination at trial, however, it was revealed that his testimony before the Grand Jury was based upon composite reports of the observations of various narcotics agents concerned with the case.

locating Sapp and granted several continuances for that purpose. The judge's repeated requests that the Government cooperate in this respect were consistent, I believe, with the spirit of *Roviaro*, though possibly not required by its letter.

Seldom can government informers be expected to be pillars of stability in their communities. If the common understanding is to be credited they are often narcotic addicts or petty criminals whose cooperation with law enforcement officials is not entirely voluntary. Under these circumstances, to give defendants the name (perhaps, as here, one of several aliases) of the Government's informer, without revealing the further information about the informer which the Government may be expected to possess, and without aiding defense counsel to find the potential witness, would only further expose the sharp disadvantages which a defendant often faces in preparing his defense to a criminal prosecution.

Concern with the debatable and debated extent of the Government's obligations under the Roviaro doctrine obscured at the trial below what, in my view, was the primary effect of the Government's failure to call Sapp as a witness for the prosecution.[4] That effect does not derive from *Roviaro*, but from a much older evidentiary rule, the rule concerned with the failure of a party to produce at trial evidence available to him.

The Narcotics Agents charged with the investigation of the case appear to have been doubtful, at least initially, concerning the sufficiency of their evidence against appellants. The events they testified to occurred in November and December of 1960. Cimino was not arrested until

[4] Exclusive attention to *Roviaro* may also explain the Government's contention that D'Ercole waived his objections with respect to the informer by failing to join with Cimino in demanding Sapp's presence at the trial. Although this failure may have worked a waiver of D'Ercole's rights under *Roviaro*, defendants in criminal cases need not object to the failure of the Government to establish a *prima facie* case against them prior to moving for acquittal for lack of having so established one.

August of 1962, nearly two years later. D'Ercole was not arrested until sixteen days after the arrest of Cimino. During the intervening period Cimino was repeatedly urged to "cooperate with the Government," presumably in giving direct evidence to support the Government's circumstantial case against D'Ercole.

In light of these facts it is curious that no consideration appears to have been given by the Government to calling the government informer as a witness for the prosecution. Except for the defendants themselves, Sapp was the sole witness who could have given direct testimony of D'Ercole's guilt with respect to either the substantive or conspiracy counts of the indictment. According to the testimony of Agents Avant and Costa, Sapp was present during nearly every conversation between Cimino and D'Ercole on November 10 and November 22 when the sale of narcotics was allegedly being arranged or consummated. Testimony from Sapp (provided that it was confirmatory of the inferences which the prosecution sought to draw) would have transformed a case of questionable evidentiary sufficiency into a prosecution establishing D'Ercole's guilt beyond any peradventure of doubt.

Assuming that Sapp was within at least the "constructive" power of the Government to call as a witness, its failure to do so and its reliance upon testimony of less probative weight, raised a presumption that the informer's testimony would have been unfavorable to the Government's case. 2 Wigmore, Evidence §§285, 286 (1940 ed.) and the many cases cited therein; *United States v. Di Re*, 332 U. S. 581, 593 (1948); *Wesson v. United States*, 172 F. 2d 931, 936; *Napper v. Rice*, 127 W. Va. 157, 32 S. E. 2d 41, 45 (1944); see *United States v. Conforti*, 200 F. 2d 365 (7 Cir. 1953). Even if the conviction of D'Ercole was not clearly erroneous when based upon the marginal evidence of Agents Costa and Avant, provided that testimony had been the only available testimony, I submit that the convic-

tion cannot withstand an unrebutted presumption that the testimony of the only non-defendant fully apprised of the facts in issue would have been unfavorable to the prosecution.[5] Whether D'Ercole's conviction may be affirmed turns, in my view, upon the question of whether Sapp was within the Government's power to the extent that it could call him as a witness at the trial below. It is to that question that I now turn.

The first identification of the government informer was secured by defense counsel in the course of his cross examination of Agent Costa:

> "Q. Now, who was this special employee you were assigned to? A. Saul Scott.
> "Q. Is that his name, would you know? A. Yes.
> "Q. What is his address?
> . . . . . .
> "A. I don't know his present address.
> "Q. Did you know the address at that time? A. In November of—
> "Q. In November of 1960. A. I didn't know his address at that time, no, sir."

By further cross examination of Agent Costa, however, it was revealed that "Saul Scott" was an alias for Saul Sapp and that over a period of many months Sapp had been contacted by Costa at room 405 in the Manhattan Towers Hotel. Under lengthy cross examination Costa further revealed that Sapp was present at the time of Cimino's arrest, and that Costa, presumably after the arrest and indictment of both appellants, had paid the informer $200 at "the end of the month of August or early September" of 1962. During September 1962, Costa again contacted Sapp at the Manhattan Towers Hotel; and in

[5] Though not applicable here, there sometimes may be reasons, as discussed in this opinion, *infra*, that would justify protection for "special employees," particularly in narcotics cases. Moreover, unlike this case, where proof of guilt, even though circumstantial, is strong, a faceless informer would not need to be produced as a government witness.

October, shortly before the trial below, Sapp attempted unsuccessfully to contact Costa at the latter's office.

Upon re-direct examination by government counsel, Costa testified that he had made attempts to contact Sapp from the latter part of September until the time of trial, but that the informer could not be reached at the bars he previously had frequented and that he was "no longer at the Manhattan Towers Hotel." These efforts to locate the informer were made, Costa testified, at the request of government counsel "in case the defense wanted him as a witness at the trial." The record is silent, however, as to any attempts by Costa or other government agents, during their earlier contacts with Sapp, to advise the informer that his testimony would be needed or to insure his availability at the forthcoming trial.

Upon this showing it is too clear for doubt, I believe, that the Government did not at any time, including those periods when the informer was under its direct control, intend to call Sapp as a witness for the prosecution. The informer's name was absent from a list of suggested witnesses prepared by narcotics agents for the United States Attorney's office despite the fact that the agents were in continuous contact with Sapp at the time the list was prepared. The Assistant United States Attorney in charge of the case never spoke with Sapp and suggested that he be located, shortly before trial, only "in case the defense wanted him as a witness."

These facts, taken by themselves, raise the presumption that the testimony of the informer would have been unfavorable to the Government's case. Moreover, that presumption gains some support from further events surrounding the search for Sapp that was reported to the judge as having been made during the course of the trial and prior to the sentencing of appellants.

After the cross examination of Agent Costa, discussed above, Judge Bryan, on the morning of Friday, November

16, 1962, adjourned the trial until the following Monday with the request that the Government "give [defense counsel] such reasonable assistance as they can" in locating Sapp. On Monday an Assistant United States Attorney reported to the court that Agent Costa had sought to locate the informer on Friday and Saturday at the Manhattan Towers Hotel, and at known haunts elsewhere, but without success. Counsel for the defense then reported that upon simple inquiry at the Manhattan Towers Hotel it was learned that Sapp still resided in room 405, under the name "S. Fields." Upon *voir dire* examination, the hotel manager testified that Sapp first checked into the hotel on October 12, 1961, under the name of S. Scott; that the same person had lived in room 405 as S. Fields, since the beginning of 1962; that Sapp's room charge for 405 had been paid within the past week; and that two telephone calls from the room had been made on November 17, five days after the beginning of the trial below. Each of these assertions was supported by hotel records offered in evidence. Agent Costa was then examined by defense counsel and admitted that although he had gone to room 405 and knocked on the door during the week end search he had left no message for the informer and had made no inquiries at the hotel concerning his whereabouts.

Whether these events reflect mere ineptitude on the part of the narcotics agents charged with finding the informer, or whether they demonstrate a disinterest or unwillingness to find him, cannot be determined on the record before us.[*] I am unable to believe, however, that with the investigative facilities available to the Government in the Southern District of New York, this informer

[*] The trial judge credited the government agents with good faith in making their search. Because of his concern solely with defendants' right to know the identity of the informer under *Roviaro*, however, the judge drew no conclusion from the Government's failure to insure Sapp's availability for trial during the period he was unquestionably under its control. Moreover, he viewed the Government's subsequent activities in searching for the informer as gratuitous government cooperation with defense counsel in locating a potential *defense* witness.

(who obligingly continued to live in an identified hotel room until at least five days after the commencement of the trial below) could not have been produced as a Government witness had the Government diligently sought to produce him. I conclude, therefore, that Sapp was under sufficient Government control during relevant periods so that failure to produce him, the witness best able to testify to D'Ercole's guilt or innocence, raised the presumption, not rebutted below, that the informer's testimony would have been unfavorable to the Government's cause.

It may be suggested that the Government's reluctance to produce informers in prosecutions such as this does not arise from a fear of what they will say as witnesses, but from a fear that they will be subjected to threats and reprisals by the defendants whose prosecutions they have facilitated. *Roviaro* commands, however, that here the informer's name be divulged to the defense; and, as here, defendants may be expected to connect the informer's name with a person with whom they have had dealings, whether those dealings were criminal or not. The subsequent physical production of the informer in the courtroom would seem to create no additional risks to those already existent.

It may further be suggested that a rule of evidence requiring the testimony of informers in criminal trials will adversely affect the entire informer system upon which the Government appears so heavily to rely in narcotics cases. I do not doubt that informers may be expected to resist any loss of the anonymity within which they operate. The evidentiary presumption which I believe to be applicable to this case, however, only arises in a limited few cases,—those cases where the informer is quite obviously better able to testify to the facts in issue than are alternative Government witnesses. Moreover, the Government's alternative evidence may often be, as in the case of appellant Cimino, sufficiently strong to withstand any unfavorable inference created by a failure to call the informer.

I have great respect for the trial judge below. The record is replete with his efforts to assure to both defendants the fair trial that they were entitled to have under the rule that does not require the prosecution to produce in court every person having knowledge of the alleged criminal acts. Moreover, the record demonstrates that continuances were granted in order to apprehend Sapp and have him in court.

Nevertheless, for the reasons advanced above, I would reverse the conviction of D'Ercole and remand the case with instructions to hold D'Ercole's case upon the present record open for a further period of time, at least three months from the date of remand, within which the Government is to produce Saul Sapp so that he may testify and be examined under oath as to his knowledge of D'Ercole's alleged participation in the activities of November and December 1960. Should Sapp be not so produced, unless his production is prevented by believable circumstances superior to governmental power, or prevented by proven deliberate interferences by defendant, D'Ercole should be acquitted.

This unusual disposition, impossible in a jury case, but quite possible in a case heard by the court sitting without jury, seems to me to be required if justice is to be done both to the Government and to the defendant. The courtroom shyness of this particular special employee has been the subject of discussion by our court heretofore, see *United States v. Glaze*, 313 F. 2d 757 (2 Cir. 1963), where he appears under his alias of "Saul Scott," the designation adopted by my colleagues in the majority opinion. I believe it time to have this shyness overcome.

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716-036—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 578

JOSEPH D'ERCOLE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 641

JOHN CIMINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 578, App. C; R. II,[1] 63b) is reported at 321 F. 2d 509.

[1] The record, comprising the appendices in the court below, is in two volumes, to which we refer as "R. I" and "R. II." "R. III" refers to the original record, which includes the transcript of the trial.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1963 (Pet. No. 578, App. A; R. II, 82b). Petitions for rehearing were denied on September 24, 1963 (Pet. No. 578, App. B; R. II, 99b–109b). The petition for a writ of certiorari in No. 578 was filed on October 23, 1963. On October 16, 1963, Mr. Justice Harlan extended the time for the filing of a petition for a writ of certiorari in No. 641 to and including November 23, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions must be reversed because the government did not produce an informant as a witness, when the record indicates that petitioner D'Ercole did not request that the government produce the informant until after conviction and that the government diligently sought to locate the informant at the request of petitioner Cimino.

2. Whether, in a non-jury trial, the court's examination of a report reciting petitioners' criminal convictions, submitted only for *in camera* inspection with regard to one petitioner's request for its production pursuant to the Jencks statute, constituted prejudicial error.

STATEMENT

After a trial before the court in the United States District Court for the Southern District of New York, petitioners were convicted of two substantive viola-

tions and a conspiracy to violate the narcotic laws. 21 U.S.C. 173, 174 (R. II, 7b, 21b). Each was sentenced as a third offender to twenty years' imprisonment on each count, the terms to run concurrently (R. III, 953, 954). On appeal the judgments were affirmed, Circuit Judge Waterman dissenting as to petitioner D'Ercole.

a. *The evidence.*—The government's evidence, developed through the testimony of federal narcotics agents, was as follows:

A federal narcotics agent, Avant, was introduced to petitioner Cimino by Scott, a special employee of the Bureau of Narcotics, on the morning of November 10, 1960, in Brooklyn, New York. As the three men proceeded in Avant's automobile to Manhattan, Avant began negotiations with Cimino for the purchase of a quarter kilo of heroin. Cimino indicated that he could get the narcotics and that he could not give a price but felt that it would be in the range of $3,600 to $4,200. He said that he must contact his source "Joe Z" (R. I, 9a–12a).

When the three men arrived at 117th Street and Second Avenue at approximately 12:30 p.m., Cimino alighted from the car and instructed Avant and Scott to meet him at Benny's Luncheonette at 116th Street and Third Avenue (R. I, 12a). Surveilling agents saw Cimino walk east on 116th Street to a point near Pleasant Avenue where he met petitioner D'Ercole and engaged in a conversation. When petitioners parted, a half hour later, Cimino walked back west in the direction of First Avenue; D'Ercole shortly there-

after entered Gus' Restaurant nearby (R. I, 33a, 58a–59a).

Cimino rejoined Avant and Scott at approximately 1:30 p.m. in Benny's Luncheonette. Cimino told Avant the delivery of the quarter kilo of heroin would take place at 7:30 p.m. and that the price would be $3,800. He stated that if Avant would agree to the price he would call "Joe Z" to make the necessary arrangements. When Avant so agreed, Cimino walked to a telephone booth, dialed the number LE 4–9197 and had a conversation (R. I, 12a–13a). At approximately this same time, an agent, having D'Ercole under surveillance, observed that D'Ercole entered a phone booth in Gus' Restaurant where he remained for a few minutes. The telephone number in the booth used by D'Ercole was LE 4–9197 (R. I, 59a–60a).

When Cimino completed his call, he requested that Avant drive him to the Eden Roc Bar at 123rd Street and Seventh Avenue. Before alighting with Scott, Cimino told Avant to meet him at this bar at 7 p.m. when he would collect the $3,800 and deliver it to "Joe Z" who would be waiting at a bakery on First Avenue (R. I, 13a). At 7 p.m., Agent Avant returned to Eden Roc Bar where he met Cimino and Scott. Cimino asked Avant to drive him to 117th Street between First and Second Avenues. There he asked for and received the $3,800 from Avant, and asked Scott to join him while he went to talk to "Joe Z" (R. I, 13a–14a). A surveilling agent saw Cimino and Scott enter Marconi's Bakery nearby, meet D'Ercole, and engage in a conversation (R. I, 34a–

35a). When the three emerged from the bakery, D'Ercole walked to 115th Street where he approached a group of men standing on the sidewalk. An agent overheard one of the men who left the group to talk with D'Ercole say to D'Ercole "I have another deal. Your deal will have to wait until nine-thirty" (R. I, 55a–56a).

Cimino and Scott, upon leaving the bakery, returned to Avant's car. Cimino said that "there was heat" in the area and that the delivery had been postponed until 9:30 (R. I, 14a). Thereupon Cimino, Scott, and Avant returned to the Eden Roc Bar where Cimino stated that all he was receiving from the transaction was $250 (R. I, 14a).

During the evening upon two other occasions, Cimino, Scott, and Avant returned to the vicinity of 117th Street (R. I, 14a, 17a, 18a). Upon one occasion Cimino and Scott were seen to leave Avant's car, enter a drug store, and converse with D'Ercole (R. I, 35a–36a). Upon the other occasion Cimino left Avant's car to enter a Cadillac which drove off immediately. He returned to meet Scott and Avant in the latter's car at Benny's Luncheonette at approximately 11:30 p.m., and delivered the heroin to Avant shortly thereafter (R. I, 19a).

Agent Avant met Cimino and Scott again on the afternoon of November 22, 1960. Avant represented that he wanted another quarter kilo of heroin but that he only had $3,600. He asked if Cimino could arrange the purchase and permit him to make up the difference on future sales. Cimino said that he believed that it would be all right but that he would

talk to "Joe Z." The three men proceeded to Benny's Luncheonette where Cimino entered a phone booth and again dialed the number LE 4-9197 (R. I. 21a).

After the call, Cimino told Avant and Scott that he was going to meet "Joe Z" at a luncheonette on First Avenue. Avant drove Cimino to 118th Street near First Avenue. Cimino asked for and received the $3,600, and alighted from the car after instructing Avant and Scott to return to the Eden Roc Bar where he would join them later (R. I, 21a–22a). Surveilling agents saw Cimino walk to 116th Street and First Avenue, enter a luncheonette, meet D'Ercole, and remain with him for about fifteen minutes (R. I, 42a–43a). When Cimino rejoined Scott and Avant, he said that delivery would take place at the Eden Roc at about 8:30 p.m. (R. I, 23a).

Twice during the evening Avant drove Cimino back to the 118th Street location (R. I, 24a). On the first of these occasions Cimino was seen to leave the car and to meet and converse with D'Ercole (R. I, 44a). Thereafter he told Avant that delivery had been postponed until 10 p.m. (R. I, 24a). Cimino did in fact deliver the heroin to Avant at 10:30 at the Eden Roc. He told Avant that he would make arrangements for him to meet "Joe Z" upon his next purchase (R. I, 25a).

At 12 p.m. on December 7, 1960, Agent Avant again met Cimino at Benny's Luncheonette. Avant represented that he was interested in purchasing another quarter kilo of heroin and asked if Cimino could make the necessary arrangements. When Cimino indicated

that he could, Avant asked if he could meet "Joe Z." Cimino said he would talk to "Joe Z" about that and he suggested that Avant call him (Cimino) at the LE 4-9197 number at 3 p.m. (R. 1, 25a-26a).

At 3 p.m. Agent Avant called LE 4-9197. Cimino's voice answered. Avant told Cimino that the price for a quarter kilo was a little too high and asked if he could make other arrangements. Cimino answered that the best price Avant could get was $3,800. Avant then asked to speak to "Joe Z." There was a pause and Avant heard another voice say "Hello." Avant asked to whom he was speaking and the voice answered "This is Joe Z." It continued, "Give Johnny the money as you have done previously on your other two purchases. Everything will be all right. The quality and the quantity of the stuff will be the same. * * * Later on we can meet and have dinner and discuss the price on future purchases." Cimino's voice then came back on the phone and asked Avant to meet him at a luncheonette on First Avenue (R. 1, 26a-31a).

At the time this conversation was taking place, agents had under surveillance Gus' Restaurant, the location of the Lehigh phone number. Shortly before 3 p.m., they saw Cimino and D'Ercole enter the restaurant and walk toward the telephone booths in the rear. At 3 p.m. Cimino went into the phone booth, then exited, and D'Ercole entered. D'Ercole came out and Cimino reentered. Thereafter both men left the restaurant together (R. 1, 48a).

b. *The inquiries as to the informant.*—At trial on November 14, 1962, counsel for Cimino, on cross-

examination of the government's first witness, Agent Avant, elicited that the name of the special employee was "Sol" ("Saul") and that "Saul" had been introduced to Agent Avant by Agent Costa (R. III, 126, 141). Two days later, Cimino's counsel, in cross-examining Agent Costa, elicited that the special employee's full name was "Saul Scott" and that his last known address (in early September 1962) was the Manhattan Towers Hotel (R. III, 307–308). At this time counsel inquired "Isn't Saul Scott also known as Saul Sapp?" and Costa indicated that this was correct (R. III, 308). Thereafter on redirect Costa was asked by government counsel what efforts he had made since September to locate Scott. Counsel for D'Ercole objected stating (R. III, 358):

> What materiality does it have, Your Honor, if efforts were made to locate Saul Scott? We are not making an issue that he is not here.

The court overruled the objection after counsel for Cimino indicated that he was going to ask the court to direct that the government produce Saul Scott (R. III, 359).

Agent Costa testified that he had since September tried unsuccessfully to reach Scott at the hotel and in various "uptown" places frequented by Scott in the past (R. III, 360). He testified, over defense objection, that he had sought to communicate with Scott up until the present time at the request of the Assistant United States Attorney "in case the defense wanted him as a witness at the trial" (R. III, 363). The court suggested that government counsel make a statement as to the availability of Scott, and counsel

for D'Ercole objected, noting, "I made no demand upon the United States Attorney for the production of Saul Scott" (R. III, 364–365). Pursuing the matter on cross-examination of Costa and two other agents (R. III, 369–375, 401–403, 411), counsel for Cimino repeated his demands that the government produce Scott (R. III, 390, 420). The court, assuring D'Ercole that any representation of fact by government counsel would not be binding upon him, asked government counsel if he knew the whereabouts of Scott. The Assistant United States Attorney replied (R. III, 428):

> I have no information—well, I won't say I have no information as to where he is; I heard rumors—purely hearsay—from agents, including Agent Costa. I have no idea where he is, Your Honor. I never saw the man in my life.

The court stated that, since the witness was not under the government's control, it would not direct that the government produce him but it told the Assistant United States Attorney that the government should help the defense by giving such "reasonable assistance" as it could in producing the witness (R. III, 430). The Assistant United States Attorney indicated that the government would so cooperate. Counsel for Cimino indicated satisfaction with this assurance and the trial recessed for the week end (R. III, 430, 432).

Thereafter the court on every day of the trial heard the statements of counsel and the sworn testimony of the government agents as to what efforts had been made to locate Saul Scott. On Monday,

November 19 (at a time when the government had rested), counsel for Cimino reported that over the week end he had knocked on the door of Room 405 of the Manhattan Towers Hotel and received no answer to his knock or to a message he had left (R. III, 438–439). He produced the manager of the hotel who testified that Scott, since checking into the hotel, had changed his name to "S. Fields," that the man had not checked out, but had paid his account for the last week and had been seen two weeks before in the lobby (R. III, 446–449). Agent Costa next testified that on Friday night, November 16, he had checked at hotel room 405 upon three occasions and found no one there—that he had never known Scott to use the name Fields given by the desk and that therefore he did not leave messages. He spent three hours checking Harlem bars—the Eden Roc, Count Basie's, Small's Paradise, the Shalimar—places which Scott had frequented. He explained that his experience as a narcotics agent had taught him never to make personal inquiries of persons in the bars but that he called back to the various places to ask if "Saul" were around and to leave a message that he call "Dave" at home (R. III, 468–475, 472). After Agent Avant also testified as to having searched unsuccessfully for Scott in the Harlem area over the weekend (R. III, 481–482), counsel for Cimino requested a further continuance to see if the government through "extensive efforts" could bring in the missing man. The court granted a continuance until the following morning, requesting the government to

use "reasonably best efforts" to find Scott (R. II, 487, 489).

On the following day, November 20, 1962, Cimino's counsel again reported on a fruitless visit to the hotel room the night before. Agent Costa told of a search beginning at 12:30 the previous afternoon and extending through most of the afternoon and evening—between five and six hours (R. III, 547–549). Agent Avant told of a search beginning at 5:30 the previous afternoon (R. III, 565–567). At this point Cimino's counsel asked Avant if he had tried to contact anyone in Philadelphia. Avant replied that he had not—that he did not know anyone there (R. III, 569).

On this day, Tuesday, November 20, Cimino completed his defense subject to reopening upon any new developments regarding Scott (R. III, 625). At the conclusion of rebuttal testimony offered by the government, the court referred to its previous holding that the witness Saul Scott was not under the control of the government and that it would not direct the government to produce him. It observed that, nevertheless, in order that both sides be given ample opportunity to locate the witness, it would grant a continuance until 2 p.m. on Friday, November 23, 1962, and it directed the government to use "its best efforts" to locate and produce Scott (R. III, 677–678).

On November 23, 1962, at the appointed time for trial, counsel again told of repeated fruitless visits and telephone calls to the hotel (R. III, 684–686).

Agents Costa and Avant testified as to their investigative activity in the vicinity of the hotel and the Harlem bars on Tuesday night, Wednesday, Thanksgiving day, and Friday morning (R. III, 687–691). The court denied Cimino's renewed motion for a mistrial[2] on the grounds that the government had failed to produce a vital witness (R. III, 692–700). The court found that the witness was not under the control of the government, that the government was under no obligation to bring him in, and that the government had taken reasonable steps to locate the witness (R. III, 699). All parties then rested.[3]

On November 26, 1962, the court found both petitioners guilty (R. III, 758–759).

On the day of sentence, December 4, 1962, Cimino's counsel indicated that he was not ready for sentence because he must have the testimony of Saul Scott. He said that on the afternoon of December 2, 1962, he received information by telephone that Saul Scott was at Manhattan Towers Hotel. He placed a call to Room 405 and a man answered. Cimino's counsel identified himself and asked if the man were "Saul." The party answered that he was "Irving Pittman" who had been authorized to pick up personal belongings of Scott, but in the conversation that followed about Scott, " kept slipping in and out of the fic-

[2] See also R. III, 441, 624.

[3] On final argument, counsel for D'Ercole argued *inter alia* that, while he had not been pressing for presence of Saul Scott, there was a right to infer, from the failure of the government to locate him, that if he were to take the witness stand, his testimony would be hostile to the government (R. III, 733–735).

tion—speaking at times as "I" and again as "My friend Saul." Counsel expressed his desire (and that of counsel for D'Ercole) to meet the party. The man promised to call counsel at 9 that night and gave his own telephone number as KI 5-9813, his home as Pennsylvania and his business address as 2002 Reed Street, Lehigh, Pennsylvania, information which counsel tried unsuccessfully to verify by telephone immediately after the conversation. Counsel next called counsel for D'Ercole to tell him of the conversation and awaited the 9 o'clock call. The call came at 12:30 a.m. and lasted some fifteen minutes. At this time the man told counsel that Saul Scott would testify. He said that his testimony might harm Cimino because he knew Cimino's relationship with women. He said that "the other man" (D'Ercole) was innocent. Counsel prevailed upon the man to come forward to testify, to call counsel for D'Ercole, and to call him again at 5 o'clock the following day. No further calls came (R. I, 77a-83a).

Counsel for D'Ercole confirmed that Cimino's counsel had called him to notify him that he might be receiving a telephone call but the call never came. He asked for a continuance "so that we may make further efforts to locate this man and then apply to your Honor to reopen the trial and permit us to elicit the testimony of this man * * * whether it be favorable to the defendant or unfavorable to him" (R. I, 83a-84a).

At the conclusion of this account by counsel, the court indicated that under these "unusual and diffi-

cult" circumstances, it was "not prepared * * * to leave any stone unturned" to obtain the testimony of Scott (R. III, 790). It indicated that sentence would be postponed for one week and it directed the government to cooperate fully with the counsel for the defendants in a "full scale effort" to locate the witness (R. III, 791–792). It instructed that the witness, if found, was to be served with a subpoena by the government as well as the defense. The Assistant United States Attorney indicated that the government would cooperate to the fullest extent and he suggested that the court direct that the government take Scott into custody as a material witness (R. III, 792–793). On this and the following day, at the request of the government, warrants of arrest were issued for Saul Scott and Irving Pittman (R. III, 805, 806).

One week later, on December 11, 1962, the narcotics agents were resworn and gave a day-by-day, hour-by-hour report of their unsuccessful attempts to locate Saul Scott (R. III, 807–831). They related contacts made with other agencies—the Philadelphia office of the Bureau of Narcotics, the New York offices of the Bureau of Customs and the United States Coast Guard in an attempt to locate him; the New York Telephone Company in an attempt to trace the telephone number KI 5-9813. They reported further surveillance of the Harlem area following reports that Saul Scott had been seen there and the results of an interview with hotel personnel. They described their investigation of reports that Scott had left for Arizona including interviews with airline employees.

At this time Cimino's counsel reported that he had gone to the Manhattan Towers hotel on December 4, together with members of Cimino's family. This was just after Cimino's sister, who would have been able to identify Scott, had reported to counsel that she had called Room 405 and that a man had answered. The management permitted the group to enter the room; they found a coat on the floor but no one there. The room had since been locked by the hotel for nonpayment of bills. Subsequent calls had been to no avail (R. III, 800–802).

Cimino's sister took the stand to testify that, on December 4 at about 11 a.m. she had left the courtroom quietly to place the telephone call after she heard Scott's name and the Manhattan Towers mentioned. She said that she had in fact called twice, at 10:45 and 11:45, disguising her voice—"I knew him very well." After Scott hung up the last time she ran to get counsel and they hurried to the hotel to find that Scott was no longer there. Upon questioning by government counsel, Cimino's sister testified that she had seen Scott once and that upon one occasion he had brought a birthday gift to her husband. She told of numerous occasions during the years 1961 and 1962 when Scott had called her house to ask for Cimino. The last such time he had called had been in June 1962 (R. III, 837–841).

At the conclusion of the testimony, counsel for Cimino expressed appreciation for the efforts made to contact Saul Scott. Assuming that this was all that could be done, he nevertheless renewed his motion

for a mistrial, arguing that Scott's testimony was urgent (R. III, 842). Both counsel asked for an indefinite continuance.

The court denied both the motion for mistrial and that for a continuance. It observed that, in its view, the government had made all reasonable efforts to locate Saul Scott, that the defendants must have been aware of his identity and that it was strange that the last telephone contact with Scott had not been brought to the attention of the court or the United States Attorney—a procedure which might have ensured Scott's apprehension. It stated that it did not feel justified in further postponing proceedings and that the defendants had a remedy under Rule 33 of the Federal Rules of Criminal Procedure[1] (R. III, 852–855).

ARGUMENT

1. Petitioners recognize that *Roviaro* v. *United States*, 353 U.S. 53, requires no more than that the government reveal the identity of an informant, in response to a demand by the accused, in circumstances where the testimony of the informant is material to the defense. They also apparently recognize that there is no general requirement that the government produce any particular witness. *Williams* v. *United States*, 273 F. 2d 781, 796 (C.A. 9), certiorari denied, 362 U.S. 951; *Eberhart* v. *United States*, 262 F. 2d 421, 422 (C.A. 9); *Washington* v. *United States*, 275 F. 2d 687, 690 (C.A. 5); 2 Wigmore (3rd ed. 1940) § 290,

[1] Rule 33 provides that a motion for a new trial on the basis of newly discovered evidence may be made within two years of final judgment.

p. 176. See *Masciale* v. *United States*, 356 U.S. 386, 388, note 4. Petitioners urge (Pet. No. 578, p. 17; Pet. No. 641, p. 4) that the rule of *Roviaro* should be extended "in the limited fashion of requiring the Government to produce an informer at trial where the informer was within the Government's control" and where his testimony could "tip the scales in favor of guilt or innocence." The facts of this case, however, do not present an occasion for an examination of that issue.

As to petitioner D'Ercole, evidence of guilt was established through the testimony of agents which placed him in the telephone booth to which Agent Avant was connected during a conversation with a person who identified himself as the "Joe Z" who had supplied Avant with narcotics. The agents' testimony also established a consistent pattern of meetings between D'Ercole and Cimino taking place immediately after Cimino had represented to Agent Avant that he was going to see "Joe Z," or just prior to the time Cimino either delivered narcotics or advised Agent Avant as to arrangements. While the testimony did show that on at least two of these occasions (on November 10th) special employee Scott was present at the meetings between Cimino and D'Ercole, this fact did not require the government to present Scott as a witness. See *Masciale* v. *United States*, *supra*; *Washington* v. *United States*, *supra*.

In any event, D'Ercole, prior to his conviction, did not request—indeed, he actively opposed—that the government produce Scott as a witness. He therefore cannot now contend that Scott's unavailability preju-

diced him in any way. Nor can he claim, as the dissenting judge stated below, that it must be presumed that Scott's testimony would have been unfavorable to the government since the government failed to produce him. For the government did not object to having Scott testify; instead it vigorously attempted to locate him. In contrast, D'Ercole objected to his production. Therefore, as to D'Ercole, if there is to be a presumption, it must be that Scott's testimony would have been favorable to the government.

It can hardly be suggested that any testimony from Scott could have "tip[ped] the scales in favor of guilt or innocence" of petitioner Cimino, as to whom there was no dissent below. The testimony of Agent Avant, corroborated by the testimony of surveilling agents, unequivocally established that Cimino delivered the heroin. See the Statement, *supra*, pp. 5, 6. Moreover the record shows that Scott was as available to Cimino as he was to the government. Cimino's sister testified that Scott was known to Cimino and had been in contact with Cimino's family frequently during the years 1961 and 1962 until only a few months before the trial. The inquiries of Cimino's counsel at trial indicate that counsel was familiar with the alias of Scott and knew of the connection he had with Philadelphia before this was suggested by subsequent events.

The record gives no basis for concluding that the witness was under the control of the government at a time when he was being sought. The witness had never been interviewed or even seen by the Assist-

ant United States Attorney. The agents had had no contact with him since early September of 1962. The facts recited by the agents as to their efforts to locate the witness revealed the diligence with which the witness was sought. These facts justified the finding of the district court that the witness was not under the control of the government and that the government had made all reasonable efforts to locate him (R. III, 699). The district court which had granted repeated continuances did not abuse its discretion in denying a further one. See *Smith* v. *United States*, 273 F. 2d 462 (C.A. 10), certiorari denied, 363 U.S. 846.

2. Petitioner Cimino demanded the report of Agent Costa under 18 U.S.C. 3500. This was a narrative statement of facts contained in memorandum reports, including information obtained by the witness from other officers (R. I, 48a). The government, anticipating a jury trial, had marked in blue the materials it thought should be excised (R. I, 49a).

When the question of production of the statements of the witness was raised, government counsel said that, since there were certain matters which were not producible, the report must be examined first by the trial court (R. I, 39a). Counsel for petitioner D'Ercole noted that, in determining what part of the report might be producible, the court might see inadmissible material (R. I, 39a). The court pointed out that it had to sit in a dual capacity and that no matter what the report said, that "doesn't affect

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The judge had previously read other reports without objection (R. I, 40a).

my judgment on this case in any manner, shape or form" (R. I, 40a). It pointed out that, unless the court were able to distinguish between what is in evidence and what is not, the practice of non-jury trials in criminal cases might as well be eliminated (R. I, 40a–41a, 53a, 62a). Consequently, the court examined the report and excluded certain portions before turning it over to petitioners (R. I, 50a). The judge denied a motion for a mistrial made by both defendants on the ground that the report contained material that reflected on the character and past history of the defendants (R. I, 53a). The court said that the material would have been grounds for a mistrial had it been called to the attention of a jury. He went on to say that he did not consider the material in the report to be evidence or part of the record and that "the Court will determine this case solely on the evidence before it and on no other basis" (R. I, 53a).

The motion for a mistrial was properly overruled. The trial court followed the procedure provided in Section 3500 for determining whether statements of a government witness were producible. See *Palermo* v. *United States*, 360 U.S. 343. While this resulted in the court's obtaining information which could not have been introduced in evidence, the court said that it would not consider this information. This court has held that our system presumes that a jury will follow instructions to disregard a confession by a co-defendant. *Delli Paoli* v. *United States*, 352 U.S. 232. *A fortiori*, a

judge can be trusted to disregard matters which he recognizes cannot be considered as evidence.[6]

Petitioner D'Ercole argues (Pet. No. 578, p. 11) that there was no need for the trial judge to obtain information concerning petitioners' criminal records, which possibly prejudiced his judgment, since either another judge or the prosecutor and defense counsel together could have decided what materials were producible. These proposals, however, are contrary to Section 3500, which provides that the trial court is to decide this issue. Moreover, it is not feasible for another judge (assuming one is available) who is unfamiliar with the facts of the case, to decide whether a statement "contains matter which does not relate to the subject matter of the testimony of the witness" (18 U.S.C. 3500(c)) in the context of a going trial. Certainly, the government need not show defense counsel reports in order to determine whether they are producible in whole or part since it would defeat the design of Section 3500 "to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States*, *supra*, 360 U.S. at 354. If the prosecutor thought the matter could legitimately be turned over to defense counsel, there would be no need to get a judicial ruling at all.

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[6] Petitioner D'Ercole's reliance (Pet. No. 578, p. 12), on *Benton* v. *United States*, 233 F. 2d 491 (C.A. 4), is misplaced. There, the trial judge, sitting without a jury, considered as evidence of intent the defendant's prior conviction. Here, the trial judge explicitly did not consider the defendants' record as evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1963.